

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

THELMA HILL)	
Claimant)	
VS.)	
)	Docket No. 217,763
U.S.D. 368)	
Respondent)	
AND)	
)	
KANSAS ASSOCIATION OF SCHOOL BOARDS)	
Insurance Fund)	

ORDER

Respondent and its insurance fund appealed the August 19, 1999 Award entered by Administrative Law Judge Robert H. Foerschler. The Appeals Board heard oral argument on December 21, 1999.

APPEARANCES

Kurt A. Level of Overland Park, Kansas, appeared for the claimant. John R. Emerson of Kansas City, Kansas, appeared for the respondent and its insurance fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for two work-related accidents. Claimant alleges that she was first injured on October 17, 1995, when a small girl accidentally struck her left temple with a band instrument carrying case. Claimant alleges that she sustained additional injuries on January 24, 1996, when she slipped on ice.

Judge Foerschler found that claimant was injured on both dates and that she was entitled to benefits for both back and neck injuries. The Judge awarded claimant a 22 percent permanent partial general disability, which was based upon the whole body

functional impairment rating. But the Judge determined that claimant's carpal tunnel syndrome was not related to either accident and, therefore, denied benefits for that condition.

The respondent and its self-insurance fund contend Judge Foerschler erred by (1) finding that the neck was injured in either of the accidents and (2) requiring them to pay any of the medical expenses associated with either the neck treatment, which included a two-level fusion and discectomy, or the complications that arose from that treatment.

The respondent and its self-insurance fund argue that claimant's neck problems resulted from a natural worsening of degenerative disk disease and that she failed to prove that she injured her neck in either accident. They also argue that any award for permanent partial general disability should be limited to the functional impairment rating. They contend claimant has failed to make a good faith effort to find appropriate employment and she retains the ability to earn wages comparable to the stipulated \$202.96 pre-injury average weekly wage.

Claimant also contends that Judge Foerschler erred.

Claimant argues that (1) she is entitled to receive benefits for both cubital and carpal tunnel syndrome, (2) she made a good faith effort to find employment after leaving respondent's employment, (3) she is entitled to receive a permanent partial general disability of 70 percent, which is determined by averaging a 40 percent task loss with a 100 percent wage loss, and (4) the respondent and its self-insurance fund should be responsible for all the medical expenses related to the neck and, therefore, should pay her the sum of \$10,205 despite the fact the hospital reduced the bill to \$3,700; or, in the alternative, the respondent and its self-insurance fund should reimburse her health insurer for the medical expenses that it paid and pay the health care providers the non-discounted amount of medical expense that is related to the neck.

The issues before the Appeals Board on this appeal are:

1. What is the nature and extent of claimant's injury and disability?
2. Are the respondent and its self-insurance fund responsible for payment of the medical expenses related to the neck?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. On October 17, 1995, a small girl ran past Ms. Thelma Hill striking her in the left temple with a band instrument carrying case. Ms. Hill immediately reported the accident

and filed an accident report with her employer, U.S.D. 368. The accident arose out of and in the course of employment.

2. Ms. Hill testified that following the October 1995 accident she consulted her personal physician, Dr. John Mahon. Although she is not certain, Ms. Hill believes the doctor x-rayed her head and prescribed pain medication. But at the regular hearing, counsel represented that they could not find any record of Ms. Hill seeing Dr. Mahon immediately following the October 1995 accident.¹

3. On January 24, 1996, Ms. Hill hurt her back, right hip, and left ankle when she slipped on ice as she was getting into her truck to deliver the school district's mail. Ms. Hill did not fall as she caught herself on the truck door, but her legs spread in a manner that she described as the "Chinese splits." Ms. Hill immediately reported the accident to her supervisor. That accident also arose out of and in the course of employment.

4. According to Ms. Hill, after the January 1996 accident she saw her family doctor who ordered x-rays and prescribed pain medication and physical therapy.

5. The school district and its self-insurance fund referred Ms. Hill to another doctor, Dr. Brian Kindred. While treating with Dr. Kindred, Ms. Hill's pain worsened and she began losing bladder control in approximately March 1996. She was then hospitalized at the Olathe Medical Center where on April 1, 1996, Dr. Steven Hess performed a two-level cervical fusion.

6. The medical center discharged Ms. Hill on April 11, 1996. After being discharged, Ms. Hill developed large pimples over her entire body and experienced problems sleeping and breathing. Additionally, she began having hallucinations and on April 17, 1996, she passed out. An ambulance took Ms. Hill to the Olathe Medical Center which referred her to Overland Park Regional Medical Center where she was admitted and treated until her discharge on April 22, 1996.

7. The school district and its self-insurance fund refused to pay the medical bills related to Ms. Hill's hallucinations. On June 18, 1996, Gallagher Woodsmall, Inc., wrote and advised Ms. Hill, in part:

This letter is to advise you the results of our investigation into your claim captioned above.

This will confirm that we will provide benefits under workers' compensation for your back and the surgery performed by Dr. Hess related to your injury of January 24, 1996. . . .

¹ Regular Hearing, April 6, 1999, p. 41.

. . .

With regard to the treatment you received on April 17, 1996, there is no medical evidence that the need for emergency treatment and subsequent hospitalization is directly related to your injury of January 24, 1996, or to a previous injury of October 17, 1995. Billings from Olathe Medical Center, Lifeguard Medical Services, Dr. Steven B. Zeiler, Miami County EMS, and Emergency Medical Care need to be forwarded to your group or individual health insurance carrier. . . .

Those medical bills were then provided to, and paid by, Ms. Hill's private health insurance carrier. Overland Park Regional Medical Center's charges initially totaled \$10,205. But the medical center adjusted its charges and Ms. Hill's private insurance carrier paid \$3,700 to satisfy the bill.

8. After recuperating from the neck surgery, Ms. Hill returned to the school district and worked part-time as a lunchroom aide and as a teacher's aide through November 1998. At that time, Ms. Hill terminated her job as part of the settlement negotiations held in this claim. When settlement didn't occur, Ms. Hill asked for her job back but the school district denied the request.

9. During the last year that she worked for the school district, Ms. Hill earned \$6.10 per hour and worked approximately 10 hours per week, although she had asked for more hours. The Appeals Board finds Ms. Hill's post-injury average weekly wage for that period that Ms. Hill returned to work for the school district following the neck surgery is \$61.

10. When she testified at the April 6, 1999 regular hearing, Ms. Hill was unemployed. She had not registered with any employment agencies and had not registered with any job placement specialists, although she had spoken with one. Ms. Hill explained that her job search consisted of looking in the want ads in the Paola, Kansas, newspaper twice a week; calling the Louisburg Cider Mill where she had once worked; and calling for a couple of house cleaning and janitorial jobs. When she testified on May 6, 1999, Ms. Hill had contacted only two potential employers in the one-month period since she had last testified – the cider mill and a trucking company.

11. The parties cannot agree as to the nature and extent of Ms. Hill's injuries caused by the October 1995 and January 1996 accidents. Ms. Hill requests benefits for the back, neck, and both arms. But the respondent and its self-insurance fund dispute that Ms. Hill's neck and arm problems are related to either work-related accident. At the April 1999 regular hearing, Ms. Hill testified that the October 1995 accident caused immediate neck pain.² But at a later hearing, Ms. Hill testified that her neck symptoms began after the

² Regular Hearing, p. 31; Continuation of Regular Hearing, May 6, 1999, pp. 109, 110.

January 1996 accident and after she was placed on crutches.³ Ms. Hill agreed that between January 1996 and March 18, 1996, she did not report to Dr. Mahon that she was having neck pain. Ms. Hill also alleges that using the crutches caused carpal tunnel-like symptoms in her hands and arms.

12. At her attorney's request, Ms. Hill saw board-certified orthopedic surgeon Edward J. Prostic, M.D., for an evaluation and functional impairment rating. The doctor examined Ms. Hill on April 1, 1997. The doctor used the *AMA Guides to the Evaluation of Permanent Impairment (Guides)* and rated Ms. Hill as having a 30 percent whole body functional impairment for her neck, back, and arms. Reading from his April 1, 1997 medical report, the doctor testified, in part:

On or about October 17, 1995, Thelma M. Hill sustained injury to her cervical spine aggravating preexisting degenerative disk disease. On or about January 24, 1996, Mrs. Hill sustained injury to her low back during the course of her employment. She has required two-level discectomy and fusion of her neck. She has had a good outcome of that surgery. She has evidence of cubital tunnel and carpal tunnel syndrome that needs additional investigation and treatment. She may respond to injections of cortisone to the areas of entrapment or need decompressive surgery.

She is bothered by a disk protrusion in her low back, but does not have sufficient neurologic symptoms to consider epidural steroid injections or surgery to the low back.

Permanent partial impairment is rated as follows: 8 percent of the body as a whole for the cervical disk disease post-operative, 6 percent of the body as a whole for continued restriction of motion of the neck, 10 percent of the body as a whole for peripheral nerve entrapment to both arms, and 12 percent of the body as a whole for the herniated lumbar disk, residual loss of motion, and residual discomfort at the left iliac crest.⁴

Dr. Prostic believes Ms. Hill aggravated preexisting cervical degenerative disk disease and spinal stenosis in the October 1995 and January 1996 accidents. The doctor also believes the cubital tunnel and carpal tunnel syndromes were related to the cervical spinal stenosis and swelling in the nerves, which then led to nerve entrapment at the wrists and elbows.

13. Dr. Prostic testified that Ms. Hill should be restricted from lifting more than 20 pounds, which was the same restriction placed upon her by neck surgeon Dr. Hess. Dr.

³ Continuation of Regular Hearing, May 6, 1999, pp. 107, 108.

⁴ Deposition of Edward Prostic, M.D., June 7, 1999, pp. 13, 14.

Prostic also testified that Ms. Hill had lost the ability to perform four of the ten former work tasks identified in a report prepared by vocational rehabilitation expert Michael J. Dreiling.⁵

14. According to Dr. Prostic, the hallucinations and other symptoms that Ms. Hill experienced in mid-April 1996 following the neck surgery were consistent with a reaction to the narcotics that she was prescribed. Based upon that testimony, coupled with that of Ms. Hill, the Appeals Board concludes that it is more probably true than not that the post-surgery complications that Ms. Hill experienced were caused by an adverse reaction to prescribed medications. Therefore, the medical treatment administered to Ms. Hill for the post-surgery complications is directly related to the neck surgery.

15. In September 1997, Judge Foerschler appointed Vito J. Carabetta, M.D., who is board-certified in physical medicine and rehabilitation medicine, for the limited purpose of performing an independent medical evaluation and determining whether Ms. Hill's arm complaints were related to the two work-related accidents. Dr. Carabetta compared nerve conduction studies and electromyographic tests taken in December 1997 with studies done in 1993 and concluded that Ms. Hill had a mild case of bilateral carpal tunnel syndrome. The studies indicated that Ms. Hill's carpal tunnel syndrome had slightly worsened as would be expected due to the mere passage of time. The doctor concluded that Ms. Hill's functional impairment had not increased over that which she had at the time of the 1993 studies. Dr. Carabetta's 1997 studies indicated no abnormality in the ulnar nerve, which ruled out cubital tunnel syndrome.

When asked about the urinary incontinence that Ms. Hill experienced in March 1996, Dr. Carabetta stated that he could only speculate as to whether that condition was related to her work-related accidents. But Dr. Carabetta was not asked his opinion of whether Ms. Hill either injured her neck or aggravated the preexisting spinal stenosis in her neck in either accident.

16. The school district and its insurance fund do not contest that Ms. Hill injured her low back in the January 1996 accident. Dr. Prostic's opinion that the work-related accidents aggravated Ms. Hill's preexisting degenerative changes in the neck is both credible and generally uncontroverted. Similarly, Dr. Carabetta's tests and testimony that rule out both cubital tunnel syndrome and a significant worsening of preexisting carpal tunnel syndrome are both credible and persuasive. The Appeals Board finds that it is more probably true than not that Ms. Hill injured her low back and neck in the work-related accidents. Using the *Guides* combined values charts, the Appeals Board finds that Ms. Hill has a 24 percent whole body functional impairment.

17. Ms. Hill failed to prove the percentage of former work tasks that she is now unable to perform as a result of the work-related injuries to her low back and neck. Dr. Prostic was the only physician to provide a task loss opinion. But that opinion was based upon an

⁵ Deposition of Edward Prostic, M.D., June 7, 1999, p. 18.

incomplete task list as the list omitted the tasks that comprised the jobs of lunchroom monitor, teacher's aide, and library aide, which Ms. Hill performed for the school district before the accidents.⁶

CONCLUSIONS OF LAW

1. The Appeals Board concludes that Ms. Hill has a 35 percent permanent partial general disability through November 30, 1998, followed by a 24 percent permanent partial general disability. Therefore, the Award should be modified.

2. Because Ms. Hill's injuries comprise an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 44-510e. That statute provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*⁷ and *Copeland*.⁸ In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that workers' post-injury wages should be based upon their ability rather than their actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injury.

⁶ Regular Hearing, April 6, 1999, pp. 19, 20.

⁷ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

⁸ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .⁹

3. For that period following the neck surgery that Ms. Hill worked for the school district, Ms. Hill has a 35 percent permanent partial general disability. As indicated in the findings above, Ms. Hill returned to work for the school district following her neck surgery and earned approximately \$61 per week. Comparing \$61 to \$202.96, which the parties stipulated as the pre-injury average weekly wage, creates a 70 percent difference in pre- and post-injury wages. Averaging the 70 percent wage loss with the 0 percent task loss yields a 35 percent permanent partial general disability.

4. The record is not clear when Ms. Hill terminated her employment with the school district although it appears that she worked through sometime in November 1998. When Ms. Hill's job at the school district ended, her post-injury earnings changed and, likewise, the permanent partial general disability rating changed.

5. For the period following November 30, 1998, a post-injury wage should be imputed as the evidence fails to establish that Ms. Hill made a good faith effort to find appropriate employment. The Appeals Board concludes that Ms. Hill has expended limited effort looking for work. Therefore, the Appeals Board imputes the minimum wage of \$5.15 per hour, or \$206 per week, as the post-injury wage for purposes of the wage loss prong of the permanent partial general disability formula.

6. Because the imputed \$206 post-injury wage is greater than the \$202.96 pre-injury average weekly wage, Ms. Hill's permanent partial general disability for the period following November 30, 1998, is limited to the 24 percent functional impairment rating.

7. As indicated above, the Appeals Board finds that the work-related accidents aggravated and worsened Ms. Hill's preexisting degenerative neck condition. The Appeals Board concludes that the expenses from both the neck surgery and the complications that Ms. Hill encountered after that surgery should be paid by the school district and its insurance fund as authorized medical treatment. Therefore, the school district and its insurance fund should reimburse Ms. Hill's private health insurance carrier for any of those expenses that it paid. Further, the school district and its insurance fund should pay any outstanding medical expense for the neck surgery and the post-surgery complications that may exist. Should there be any dispute whether the medical expenses are reasonable or the services necessary, the parties are directed to utilization review as provided by the Workers Compensation Act and administrative regulations.

⁹ *Copeland*, p. 320.

8. The Appeals Board denies Ms. Hill's request for payment to her in the sum of \$10,205, which is the amount Overland Park Regional Medical Center initially billed for the medical services provided to treat Ms. Hill's adverse drug reaction. The Appeals Board is unaware of any statutory authority in the Workers Compensation Act that provides that an injured worker is entitled to receive direct payment for the amounts owed to health care providers.

AWARD

WHEREFORE, the Appeals Board modifies the August 19, 1999 Award, as follows:

Thelma Hill is granted compensation from U.S.D. 368 and its insurance fund for a January 24, 1996 accident and resulting disability. Based upon an average weekly wage of \$202.96, Ms. Hill is entitled to receive 36.36 weeks of temporary total disability benefits at \$135.31 per week, or \$4,919.87, followed by 104 weeks of benefits at \$135.31 per week, or \$14,072.24 for a 35 percent permanent partial general disability payable through November 30, 1998. Thereafter, no additional weeks of permanent partial general disability benefits are due for the 24 percent permanent partial general disability due to the accelerated payment of benefits. Thelma Hill is granted a total award of \$18,992.11, which is all due and owing less any amounts previously paid.

The Appeals Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of March 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kurt A. Level, Overland Park, KS
John R. Emerson, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director